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Supreme Court of the United States

OCTOBER TERM, 1978.

No. 78-1316

FLEX-A-LITE CORPORATION,
Petitioner,

vs.

SCHWITZER DIVISION,
WALLACE-MURRAY CORPORATION,
Respondent.

REPLY BRIEF OF PETITIONER.

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Proceeding from that point, Schwitzer misrepresents the facts and holding of *Patten* v. *Smith*, ... Ind. App. ....., 360 N. E. 2d 233 (1977), by pretending that it was a strictly private, commercial libel case devoid of public interest aspects, and states that the Court's decision was rendered in that context.

Nothing could be further from the truth. Patten was decided on the basis that it involved a question of public interest—not on the basis of extending a qualified privilege to commercial speech.

In *Patten*, construction of a public, 72 crypt, 32 niche mausoleum was being proposed for a public cemetery in the city of Plymouth, Indiana. The city council passed a resolution which declared the construction to be in the best interest of the city. The city had entered a lease agreement which placed upon it the obligations of maintenance and entombment. The mausoleum was to be built on city land, with the city paying the expense of paving the road to the mausoleum. Patten, a monument dealer, mailed 1,500 to 2,000 brochures to Plymouth residents attacking the project.[1] The case was correctly treated as involving a matter of public concern, because of the facts related. Contrary to Schwitzer's representation in footnote 16, the Court in *Patten* did not hold or imply that "commercial matters are deemed to be of public concern."

The determinative holding of *Patten* is as follows:

> "Aafco 'requires the private individual who brings a libel action *involving an event of general or public interest* to prove that the defamatory falsehood was published with knowledge of its falsity or with reckless disregard of whether it was false.' 321 N.E.2d at 586. *This test governs our disposition of the issues discussed below.*" (360 N. E. 2d p. 237) (Emphasis supplied.)

In its effort to convey the false impression that Indiana law requires that the *New York Times* "actual malice" test must be

1. Population of Plymouth is 7,600. Thus, a majority of homes in the city received brochures.

met in all libel and slander cases, Schwitzer also cites *Aafco Heating & Air Conditioning Co.* v. *Northwest Publications, Inc.*, 162 Ind. App. 671, 321 N. E. 2d 580 (1976).

Aafco is a typical media case, full of discussion of *New York Times* v. *Sullivan, Rosenbloom* v. *Metromedia, Gertz*, etc. Concern is expressed about self-censorship by the press, and the balancing of the interest of society in freedom of press and the *"protection of the private individual's reputation when it is involved in matters of general and public concern."*

The key language which proves that the Court in *Aafco* did not intend to extend the constitutional privilege enjoyed by the press to purely private defamation cases is as follows:

> "We adopt a standard that requires the private individual who brings a libel action *involving an event of general or public interest* to prove that the defamatory falsehood was published with knowledge of its falsity or with reckless disregard of whether it was false." (162 Ind. App. p. 679; 321 N. E. 2d p. 589) (Emphasis supplied.)
>
> "This Court believes that the subject matter test adopted in this opinion—an event or topic of general or public interest—will provide both the media and the courts with sufficient guidance as to those matters which are appropriate for public comment and thus accorded the protection of constitutional privilege." (162 Ind. App. p. 685-686; 323 N. E. 2d p. 590)

Footnote 8 in *Aafco* states:

> "Indiana law reflects the historic rule that publication in written form of statements defamatory *per se*—words which, on their face and without regard to extrinsic facts, tend to injure the reputation of another—subjects a publisher to liability although no harm to reputation is actually proved. *Indianapolis Newspapers, Inc.* v. *Fields* (1970), 254 Ind. 219, 255-56, 259 N.E.2d 651, 667-668, *cert. denied* 400 U.S. 930, 91 S.Ct. 187, 27 L.Ed.2d 190 (1970); *Gibson* v. *Kincaid* (1966), 140 Ind.App. 186, 201, 221 N.E.2d 834, 843 . . ." (162 Ind. App. p. 684; 321 N. E. 2d p. 589)

Thus, *Aafco* limits the requirement of proof of "actual malice" to communications concerning matters of general or public interest and at the same time affirms the fact that the doctrine of presumed damages, in cases involving libel *per se*, is still the law of Indiana.

It is, thus, clear that Indiana has never invoked the "actual malice" standard in a purely private defamation case. The traditional rule allowing presumed damages for libel *per se*, and punitive damages in such cases has not been disturbed. Consequently, Schwitzer's assertion that Indiana law would have prohibited recovery for slander in the case at bar without reference to *Gertz* is wholly false.

Schwitzer twice asserts that:

> "the States have no substantial interest in securing for plaintiffs . . . gratuitous awards of money far in excess of any actual injury."

To the contrary, the States do have a substantial interest in protecting their citizens from having their reputations ravaged by vicious libels and slanders. Punitive damages constitute the vehicle by which the wrongdoer is punished and deterred from repeating his offense. At the same time, an example is created to deter others who would be tempted to emulate the actions of the wrongdoer, were he to go unpunished. The long recognized difficulty of proving damages stemming from libel and slander would allow the slanderer to profit from his acts were it not for punitive and presumed damages. Hence, the State does have a substantial interest in the award of damages over and above the dollar amounts which can be proved.

II. Denial of Publication.

On page 8 of its brief, Schwitzer concedes that the case at bar is the first Federal Court decision extending *Gertz* to a non-media case. Then, on page 11, it contends that there is no indication that the Seventh Circuit did not correctly apply its Rule 35 in

denying publication. The two statements are in apparent conflict, since Rule 35(1) provides that published decisions shall be filed when they "establish a new or change an existing rule of law."

The contention that the denial of publication is not appropriate for certiorari raises the question: If the Supreme Court of the United States will not require Courts of Appeal to publish their decisions which hold unconstitutional the prevelant case law of the states comprising their circuits, how else is that necessary end to be accomplished?

III. Disallowance of Damages Without Further Consideration on Remand.

In its Petition for Certiorari, Flex-A-Lite contends that the Seventh Circuit's elimination of virtually all its damages ($998,802 of the $1,107,397 awarded by the District Court), together with its prohibition of further proceedings on remand, was such a departure from the accepted and usual course of judicial proceedings that this Court should hear the case and determine whether that disposition was proper. Flex-A-Lite cited a number of this Court's cases to show that the accepted and usual course upon setting aside damages is to permit further findings or evidence in the Trial Court.

Schwitzer's Brief in Opposition does not really address the question of whether the Seventh Circuit's disposition of this case was such a departure from the judicial mainstream that this Court ought to review it. Schwitzer neither critizes Flex-A-Lite's citation of this Court's cases, nor cites any other Supreme Court case. Indeed, Schwitzer seems almost to concede that the Seventh Circuit's disposition here was different from the usual procedure.

Schwitzer cites three Court of Appeals cases which show, at most, that under certain circumstances, not those of this case, further proceedings are not required after damages are disallowed. *Webb* v. *Utah Tour Brokers Ass'n*, 568 F. 2d 670 (10th Cir. 1977); *Agricultural Services Ass'n Inc.* v. *Ferry-*

Morse Seed Co., 551 F. 2d 1057, 1072-1073 (6th Cir. 1977); *Edwards* v. *National Audubon Society, Inc.*, 556 F. 2d 113 (2d Cir.), *cert. denied*, 434 U. S. 1002 (1977).

Schwitzer cites *Edwards* v. *National Audubon Society, Inc.* as showing that "a defamation award may properly be set aside without the need for a new trial." That case did not involve the application of a stricter malice standard on appeal than had been applied in the litigation below, and thus does not conflict with this Court's cases, cited by Flex-A-Lite at page 17 of its Petition for Certiorari, which show, that where a stricter defamation standard should have been applied, the accepted and usual course is to give plaintiff the opportunity to adduce additional proof to meet that standard.

Here, the Seventh Circuit adopted a stricter standard for slander ("actual malice") than had been applied below. Even if the Seventh Circuit correctly adopted this new standard for purely private defamation, it was wrong not to follow accepted and usual procedure, and permit further findings or evidence under the stricter standard.

The other two cases cited by Schwitzer, *Webb* v. *Utah Tour Brokers Ass'n.* and *Agricultural Services Ass'n Inc.* v. *Ferry-Morse Seed Co., supra,* both involved elements of damage as to which there was no evidence at all.

In *Webb* a new trial on damages for claimed lost profits was not required because there had been "no evidence that the plaintiffs ever made a profit, and . . . a complete dearth of evidence allowing a projection that a profit would have been made. . . ." *Webb, supra,* at 677. Similarly, *Agricultural Services Ass'n* disallowed, without retrial, the portion of a judgment awarded for loss of goodwill where ". . . the record is barren of evidence of growers becoming disillusioned with (plaintiff)." *Agricultural Services Ass'n, supra,* at 1072.

Schwitzer does not deny that the usual procedure where there was some evidence of the damages disallowed has been to permit

a new trial. Here, there was evidence tending to show damages of each type disallowed. Thus, none of the cases cited by Schwitzer justify the Seventh Circuit's refusal to follow the accepted and usual procedure, which would permit further findings or evidence, or a complete new trial.

The Seventh Circuit's failure or refusal to acknowledge the evidence is part and parcel of its erroneous decision, not a justification for it, as Schwitzer would have it. Flex-A-Lite's Petition for Rehearing, printed in the Appendix to the Petition for Certiorari at A76-A94, cites testimony, exhibits and undisputed findings of the District Court which show its decision was not "clearly erroneous". (See Points 4, 5, 6 and 7, A86-A93.)

CONCLUSION.

In view of the foregoing, it is respectfully submitted that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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